



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Marvin J. Perry & Associates

File: B-277684; B-277685

Date: November 4, 1997

Malcolm D. Wilson for the protester.

Georgia Vlahos, Esq., and Kenneth J. Densmore, Esq., Department of the Navy, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Modifications of orders under General Services Administration Federal Supply Schedule for red oak sleeping room furniture to allow a change in the type of wood to ash, which is less expensive than red oak, materially changed the nature of the orders from those originally issued and thereby prejudiced the protester, a competing vendor.

DECISION

Marvin J. Perry & Associates protests the modifications of delivery order No. GS-27-F-028B and purchase order No. N00210-96-M-0566, issued by the Department of the Navy, Naval Training Center, Great Lakes, Illinois, to DCI for red oak sleeping room furniture. Perry essentially contends that the modifications were beyond the scope of these orders.

We sustain the protest.

This procurement was for 563 10-piece sets of red oak sleeping room furniture to furnish a bachelor enlisted quarters (BEQ) that was under construction. Prior to the procurement, the Navy contracted with an architectural firm to design the interior space for the project. The firm recommended Perry as the vendor holding a General Services Administration (GSA) Federal Supply Schedule (FSS) contract offering the lowest-priced red oak furniture that met the functional needs of the agency with respect to aesthetics and quality.¹ In order to ensure that Perry's products represented the best value, the Navy decided to solicit quotes from those vendors with similar products on the FSS.

¹The FSS program managed by GSA provides agencies with a simplified process for obtaining commonly used supplies and services at prices associated with volume buying. Federal Acquisition Regulation § 8.401(a).

Only 9 of the 10 pieces of each set could be obtained from the FSS, and on April 1, 1996, the Navy solicited quotes for these 9 pieces of red oak furniture under request for quotations (RFQ) No. N00210-96-Q-1496. On that same date, quotes were solicited for the remaining piece--the red oak footboard to the bed--under RFQ No. N00210-96-Q-1497.²

The Navy received eight quotes for the nine pieces of furniture and six quotes for the footboard by the May 30 closing dates. DCI submitted the lowest quote of \$557,127.91 for the nine items; Perry was next low with a quote of \$572,709. Perry submitted the lowest quote of \$18,016 for the footboard; DCI submitted the next lowest quote of \$19,789.45. Since DCI's quotes reflected the lowest total price, the Navy issued the delivery order from the FSS for the nine pieces to DCI on June 11 and the purchase order for the footboard to DCI on June 18. The original delivery date for the furniture was scheduled for September 30, but several construction delays resulted in the delivery date being pushed back to June 9, 1997.

In May 1997, DCI advised the Navy that its supplier had mistakenly delivered ash instead of red oak. Because of this, DCI proposed that the Navy either accept furniture made with ash at the same price or postpone the delivery date. In support of accepting ash furniture, DCI provided the Navy with samples of ash stained to match the color of red oak. After comparing the samples with the red oak furniture already in the BEQ, the Navy determined that the ash furniture was an acceptable substitute. The parties agreed to the substitution on May 19. The Navy accepted delivery of the ash furniture in June.

In late June, Perry learned that the Navy had permitted DCI to substitute ash furniture for red oak furniture. Perry initially sought an explanation from the agency by letter dated June 30, in which it complained that changing the wood from red oak to ash would be unfair to those quoters who based their quotes on providing furniture made from red oak, because ash is a lower grade and lower priced wood, and that if "there was no authorization" to change the wood, the Navy should reject DCI's furniture and make award to the next low quoter--Perry. The Navy responded by letter dated July 21 (received by the protester on July 25) asserting that the change was insignificant. On August 4, Perry protested the Navy's actions to our Office.

The Navy initially argues that the August 4 protest is untimely because it was filed more than 10 working days after late June when the protester knew of the basis of protest. We disagree. Although the protester's June 30 letter to the agency was not expressly characterized as a protest, we will treat it as an agency-level protest

²Because the footboard was required to match the headboard, the RFQ for the footboard was distributed only to those FSS vendors solicited for the other furniture pieces.

because it clearly conveyed an expression of dissatisfaction and a request for corrective action. See Dynamac Corp., B-252800, July 19, 1993, 93-2 CPD ¶ 37 at 3; American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183 at 2-3. Since the August 4 protest was filed by Perry within 10 days of its receipt of the agency's response to its June 30 letter, we consider the protest to be timely filed with our Office. 4 C.F.R. § 21.2(a)(3) (1997).

The agency next argues that the protest involves a matter of contract administration which is beyond the purview of our bid protest jurisdiction. See 4 C.F.R. § 21.5(a). While this is generally true, we will consider a protest that a modification to an existing contract is beyond the scope of that contract, changing the nature of the contract originally awarded. See Indian and Native Am. Employment and Training Coalition, 64 Comp. Gen. 460 (1985), 85-1 CPD ¶ 432; Dynamac Corp., *supra*, at 4.³ In determining whether a modification to a contract is within the scope of the contract, we look to whether there is a material difference between the contract, as modified, and the original contract, considering such factors as the extent of any changes in the type of work, performance period, and costs between the modification and the original contract, as well as whether the original solicitation adequately advised offerors of the potential for the change or whether the change was the type that reasonably would have been anticipated, and whether the modification materially changed the field of competition for the requirement. Avtron Mfg., Inc., 67 Comp. Gen. 404, 406-407 (1988), 88-1 CPD ¶ 458 at 4; Dynamac Corp., *supra*, at 4.

As indicated above, Perry advises that ash is materially different from red oak in terms of cost and quality. For example, Perry asserts that its supplier could have obtained ash wood in its raw form for a cost at least 40 percent cheaper than red oak.⁴ Perry also asserts that it would have been able to reduce its bid price by \$47,885 (which would have made its quote lower than DCI's), if it had known that ash was an acceptable alternative. In addition, Perry advises that while ash may appear similar in terms of radial grain patterns and cell growth elongation, the difference between the two woods is in hardness and density, and that red oak is superior to ash for purposes of joinery, thereby resulting in more structurally sound pieces of furniture and a greater long-term value to the user.

³While the cases cited here arose in the context of contracts rather than FSS orders, we believe, as explained below, that the principle they stand for holds for competed FSS orders as well.

⁴To bolster its claim, the protester offers a copy of the Weekly Hardwood Review that reflects that at the time the orders were awarded ash sold for \$525 per thousand board feet (MBF), while red oak sold for \$855 MBF.

The Navy does not dispute that ash is inferior in quality to oak and can be obtained at a lower cost than red oak. The Navy does assert that it contacted two local lumberyards, who indicated that there would be only a small price differential (approximately 1 to 5 percent) between the cost of ash and red oak because ash, although cheaper, is not as readily available as red oak in the quantities needed to fill large orders. However, the Navy has presented no basis for us to question Perry's documented contention that it and other FSS vendors in the furniture business could have obtained ash at a substantial savings over red oak, and that this savings would be translated into lower prices. Further, there is no basis to regard the change as one that could reasonably have been anticipated by Perry or the other FSS vendors that submitted quotes for red oak furniture.

In sum, we think that the original purpose of the orders was so substantially changed by the modification that the original orders and the modified orders are essentially different. Even though the record does not show that the total cost savings of the modifications to the originally placed orders would be massive, the record does evidence that if quotes had been obtained from the FSS vendors on the basis of ash rather than red oak furniture, prices may have been significantly lower than the award prices, and that a different vendor may well have been selected. See Avtron Mfg., Inc., *supra*, at 5.

The Navy, nevertheless, argues that it was not prohibited from modifying the order, irrespective of the nature of the change, or required to solicit the other FSS vendors, because the procurement was conducted under the FSS program. In this regard, FAR § 8.404(a) provides in pertinent part:

When placing orders under a [FSS], ordering activities need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides

The Navy further asserts that, unlike an invitation for bids or request for proposals, a delivery order need not conform to every detail of the RFQ, which is issued primarily for informational purposes. The Navy argues that the RFQ was issued only to identify the FSS vendor meeting its needs at the lowest cost and that having done so, the agency was not prohibited from changing the requirement in issuing its final delivery order since it could have simply placed the order with the selected vendor without issuing RFQs. We disagree.

Although the Navy conducted this procurement under the FSS program, it elected to solicit competitive quotes from vendors on the FSS and it made award to DCI, the vendor with the lowest quote. Having elected to hold a competition in order to ensure that it received the lowest-priced items, the Navy was obligated to ensure that the competition was conducted fairly; the fact that a requirement is fulfilled through the FSS does not exempt an agency from treating vendors consistent with

the concern for a fair and equitable competition that is inherent in any procurement. See Haworth, Inc.; Knoll N. Am., Inc., 73 Comp. Gen. 283, 286-287 (1994), 94-2 CPD ¶ 98 at 5-6; SMS Sys. Maintenance Servs., Inc., B-270816, Apr. 29, 1996, 96-1 CPD ¶ 212 at 4-5; Dictaphone Corp., B-254920.2, Feb. 7, 1994, 94-1 CPD ¶ 75 at 3. Here, in order to fulfill its obligation to allow vendors to compete on a fair and equal basis as well as to satisfy itself that it received the best value (in this case lowest price), we think that the Navy was required to give the competing vendors an opportunity to submit quotes for supplying furniture made from ash instead of simply modifying DCI's orders in a manner that exceeded the scope of the contracts and the original competition.⁵

Because the furniture under the orders have already been delivered, corrective action is not practicable. We recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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⁵By not issuing revised RFQs or checking other vendors' FSS prices for ash furniture, the agency did not ensure that it received the best price for the ash furniture, which was the stated purpose for issuing the RFQs in the first place.